DISPUTE SETTLEMENT IN INTERNATIONAL COMMERCIAL AGREEMENTS: THE LAW AND NATIONAL INTEREST IN PAPUA NEW GUINEA

BY

MOSES KOIRI

PART I: INTRODUCTION

The parties to international commercial agreements give great care to questions which involve the governing law of the agreement, the choice of an arbitration clause, and the choice of a forum should it be necessary to settle disputes before a court.

In Papua New Guinea there are paramount government or national interests that have to be considered in the course of negotiating an investment agreement between a Papua New Guinean party and the foreign investor. The government makes it mandatory to refer investment disputes to domestic tribunals. It is generally felt that such interests would be best considered by a domestic tribunal that is familiar with the socio-economic and legal context from which investment disputes originate.

However, on occasions where the domestic tribunals may prove inappropriate to preside over an investment dispute, submission to foreign tribunals is tolerated and permitted to a certain degree; but only after domestic tribunals have been exhausted without any final solution.

This article examines the general law in Papua New Guinea concerning the governing law of international agreements, arbitration, and choice of forum. It is particularly concerned with the extent to which parties have autonomy over these matters, or to which they have to submit to domestic law.

The article is divided into four main parts. The first part examines the law and other factors to be taken into account in Papua New Guinea when deciding upon the rules relating to the possibility of litigation and arbitration. The second part looks in more detail at the law governing arbitration in Papua New Guinea. The third part of the article examines the domestic law in Papua New Guinea on the governing law of an agreement. The final part of the article considers questions of remedies and enforcement in Papua New Guinea in relation to disputes arising from international commercial agreements.

PART II: CHOICE OF TRIBUNAL IN PAPUA NEW GUINEA

The decision on the choice of a tribunal is primarily concerned with the determination of two basic questions:

(a) whether to arbitrate or litigate; and

(b) whichever process is chosen, whether to use the dispute settlement institutions available in Papua New Guinea or those elsewhere.

The more specific and complex questions of applicable law and forum are then considered in this part , not in isolation from each other, because the decision whether to arbitrate or litigate may be greatly influenced by the applicable law and forum.

The Decision to Litigate

Acknowledging that the judiciary forms one of the three basic and fundamental arms of government, the functions of municipal courts as forums where conflicts of any legal nature may be settled is almost taken for granted. It is comparatively easy for the courts to decide, in domestic matters, whether they have jurisdiction and what law applies, but it is not so easy if the case has an international element.

The conduct of transnational commerce stretches into many countries which differ significantly in language, custom, religion, and legal systems. These differences are the cause for apprehension and caution by foreigners who are parties to trade agreements with the host country, and who may hesitate to submit to a legal system which they fear may arbitrarily favour the host party.

The decision whether to litigate is often determined by the nature and duration of the trade agreement, because international commercial practice views litigation as a process affected by delays, and the publicity given to court proceedings intrudes into the privacy of the parties; a factor which is crucial to the maintenance of good trade relations between the parties concerned. Litigation is also thought to import harshness and hostility which is undesirable in international economic co-operation. Business relations of long standing and long-term contracts to pursue long-range objectives present 'situations in which the parties operate in a climate of trust and co-operation rather then competition and have no wish to see their relations

disturbed by unnecessary friction, least of all a law suit'(1) Nevertheless, resort to courts may in some circumstances be evitable.

Having decided to litigate, the selection of a suitable forum becomes the next consideration. So, the foreign litigant in a commercial dispute arising from an international commercial agreement to which a Paua New Guinean is a party is faced with a choice between the Papua New Guinean courts or a forum outside Papua New Guinea.

The Papua New Guinea Courts

The municipal courts in the Papua New Guinean judicial system are available as forums for the settlement of commercial disputes if the parties choose to litigate. Primarily, the National Court (2) and the Supreme Court (3) are the two courts available to the parties for the settlement of their disputes.

The National Court is the forum in which an action is instituted at first instance. The jurisdiction of the District Court, the court below the National Court in the hierarchy, is limited to cases in which the subject matter has a value of K1,000 to K10,000. (4)

The jurisdiction of the National Court is derived from section 166(1) of the **Constitution** :

> 'Subject to this **Constitution**, the National Court is a court of unlimited jurisdiction'.

and described in section 155: Section 155(3) says:

> The National Court -
>
> (a) has an inherent power to review any exercise of judicial authority; and
>
> (b) has such other jurisdiction and powers as are conferred on it by this Constitution or any law,

---

1. G.R. Delaume, 'Party Autonomy and Express Stipulations of Applicable Law' 1 **Transnational Contracts** (New York 1980 1.

2. Established by the **National Court Act**, Chapter 38 of the Revised Laws of Papua New Guinea.

3. Established by the **Supreme Court Act**, Chapter 37 of the Revised Laws of Papua New Guinea.

4. **District Court Act**, Chapter 40 of the Revised Laws of Papua New Guinea, Section 29 (as amended).

except where -

(c) jurisdiction is conferred upon the Supreme Court to the exclusion of the National Court; or

(d) the Supreme Court assumes jurisdiction under subsection (4); or

(e) the power of review is removed or restricted by a Constitutional Law or an Act of Parliament.

Section 155(4)

Both the Supreme Court and the National Court have an inherent power to make, in such circumstances as seem to them proper, orders in the nature of prerogative writs and such other orders as are necessary to do justice in the circumstances of a particular case.

The Supreme Court is the final court of appeal (5) and accordingly any appeal from commercial cases instituted in the National Court is finally determined in the Supreme Court.

The Independence of the Judiciary in Papua New Guinea

It is now necessary to consider the position of the judiciary and how effective it is as a means of resolving conflicts.

The governments of many developing nations find that the struggle to survive and maintain a stable, viable economy against the pressures of other competing entities in the nature of multinational corporations has tended to over-emphasize the promotion and protection of development efforts at the expense of an impartial judicial system. This has often led to economic interests over-shadowing individual rights where the State asserts its dominance and exercises strict control over the economy.

In Papua New Guinea, the independence of the judiciary is guaranteed in the **Constitution**, giving it maximum protection and this shows the high regard in which the concept of justice and its procedures are held. Section 99(3) of the **Constitution** states that 'the respective powers and functions of the three arms (of the National Government) shall be kept separate from each other'. Section 157 is more to the point:

> 'Except to the extent that this Constitution specifically provides otherwise, neither the Minister responsible for the National Justice Administration nor any other person or authority (other than the Parliament through legislation)

---

5. The **Constitution**, Section 155(2)(a). The jurisdiction of the Supreme Court is set out under section 162. See also the **Supreme Court Act**.

> outside the National Judicial System has any power to give directions to any court, or to any member of any court, within that system in respect of the exercise of judicial powers or functions'.

Scepticism does give grounds for saying that statutory wording is one thing and adherence to it another. Fortunately, the independence of the judiciary in the country has been put to the test and has come out of it intact, perhaps more forcefully than necessary. The case, Re **Rooney**, **(6)** which earned a place in the history books of Papua New Guinean politics, illustrates the point. Briefly, this case involved Mrs. Rooney, then Minister for Justice, who wrote to the Chief Justice concerning another case regarding the deportation of a foreigner. The minister's letter to the Chief Justice was alleged to imply giving directions to the Court to enhance the Government's interests. By a majority decision the minister was sentenced on a charge of contempt of court to imprisonment for a period of eight months. Shortly afterwards the Prime Minister, who took over as Minister for Justice, released Mrs. Rooney on a 'licence' exercising such power under the **Criminal Code Act.(7)** Several judges resigned and some time later the Government lost office on a vote of no confidence.

A further recognition of the independence of the judiciary is contained in several sections of the Papua New Guinea **Criminal Code**, which make it an offence for any person to conspire to (s.131), or attempt to (s.139) obstruct, prevent, pervert or defeat the course of justice'.**(8)** Moreover, the guarantee of the independence of the judiciary in the **Constitution** seems to ensure that, in spite of government interests in a case, the judges are able to judge according to the facts and the law free from any pressures from the State.

> The independence of the National Judicial System, of which the judiciary forms a part, is further recognised in s.176 (3(a)) and (5), s.183(4) and s.233 (of the **Constitution**). The Judicial Declaration that each member of the judiciary is required, by s.249 of the Constitution, to make before entering upon duties of, or exercising any of the powers of, his office is inconsistent with there being any erosion of the concept of the independence of the judiciary.**(9)**

---

6. Re **Rooney** (No.2) [1979] P.N.G.L.R. 448

7. Chapter 262 of the Revised Laws of Papua New Guinea.

8. Re **Rooney**, 44, 492.

9. Re **Rooney**, per Wilson J. 493

The Voluntary Stipulation of a Foreign Forum

A stipulation in an international commercial undertaking between a Papua New Guinean entity and a foreign investor to submit any dispute arising between them to a foreign court may, notwithstanding that the stipulation is voluntary, give rise to fears that the foreign forum might suppress the Papua New Guinean party's rights and protect the local party. Nevertheless, provisions for submission of disputes arising from commercial agreements between international parties to a domestic forum of one of the parties are common.

In Papua New Guinea, commercial agreements which relate to investments are subject to the rule that local remedies be exhausted (10) before any recourse to a foreign forum is attempted. Assuming that local remedies have proved unsuccessful and if the agreement states that the dispute be submitted to a foreign court, the Papua New Guinean party may be compelled to be answerable in a foreign court.

The Submission of Disputes to a Foreign Forum with the Government as a Party

The usual relationship created by the government entering into contractual obligations with a foreign entity is a State Contract. The legal nature of state contracts has been the subject of much legal debate and it is not the purpose of this discussion to speculate further other than to refer to some related issues which flow from it.

It is appropriate to make a few assumptions. First, a contract entered into by the government and a foreign party is often concluded after lengthy negotiations and bargaining during which each side tries to secure a deal as beneficial as possible to itself. Among the many different aspects of the contract discussed between the parties, there are inevitably negotiations about how subsequent disputes are to be settled. Secondly, most foreign investors feel more comfortable when they know that an independent third party will decide disputes arising from the agreement.

If the foreign investment is badly needed the government is more likely to comply with the foreign investor's insistence that the venue of dispute settlement be outside Papua New Guinea.

---

10. See the **Investment Disputes Convention Act 1978** section 2(a)

11. The main legislation is the Investment Disputes Convention Act 1978.

The legislative provision (11) concerning the settlement of investment disputes, appears not to mention submission to a foreign municipal court and it seems that the government is opposed to resort to external dispute settlement tribunals.

Judging from the **Investment Disputes Convention Act** and trade agreements,(12) the Government favours submission to autonomous international dispute-settling institutions rather than to the municipal courts of a foreign country. among other uncertainties, submission to foreign municipal courts hold fears for the government's sovereignty being undermined, and such fears would create other problems which would make the solution of a dispute difficult.

One of the main problems of disputes concerning parties who are sovereign in their own right is getting the parties to vest their confidence and trust in the authority responsible for the resolution of their conflict. The parties have to put aside (where possible and practicable) the veil of sovereign immunity and come to the tribunal as mere juridical persons whose concern is fundamentally the settlement of their dispute and the fulfilment of their obligations under the agreement. The absence of any mention of submission to a foreign municipal court implies that the Papua New Guinea government does not see it as proper and in line with its policies on the subject of control over investment agreements to submit to another foreign jurisdiction where its fate would rest in the municipal forum of a foreign country. Furthermore, if the case requires the attention of municipal forums then the domestic courts and tribunals in Papua New Guinea are considered equally capable of handling disputes. So, it may well be said that submission to an external tribunal is possible but only to one which is convened by an international institution such as the International Centre for the Settlement of Investment Disputes (ICSID) or the International Court of Justice.

International Centre for the Settlement of Investment Disputes

Submission to the ICSID requires a waiver of sovereign immunity (13) on the part of the Contracting States to enable the ICSID to execute its functions as a dispute settling institution. The prior condition that local remedies be exhausted before the dispute is submitted to the ICSID, is of special significance.

---

12. The Trade Agreements with the United Kingdom and also the Federal Republic of Germany. Copies circulated to the author.

13. **Investment Disputes Convention Act**, Schedule: article 27.

The provision is designed to give the State party ample time to resolve the conflict through the use of its domestic dispute settlement machinery. If the matter is of a trivial nature which is capable of being resolved in the local forum, the State party must take the initiative to do so. On the other hand, if the matter is of a magnitude which requires the facilities of the ICSID or the local remedy does not satisfy the parties, then the dispute may be submitted to the Centre. Upon submission to the ICSID, the State party must appear as a disputant-party without the armour of sovereign immunity; the new environment of the ICSID which allays fears of vested interests on the part of the tribunal or the undermining of sovereignties does not warrant such privilege.

It is noteworthy that submission by the government to an international dispute-settling institution like the ICSID means a loss of control over investment agreements. However, this loss must be weighed against the benefits of the agreement and the need to compromise in order to appreciate its value to the development programmes of the Papua New Guinea government.

Submission of Disputes to Foreign Forum when Non-Government Entity is a Party.

The sovereign, or the central government, has the power to make rules and laws, or to issue decrees and impose decisions which must be obeyed by the population as a whole, and disobedience of which is punished.**(14)**

The mandate vested in the government by its subjects provides the Papua New Guinean government with the authority to become the ultimate regulator of all activities in its territory. In the conduct of international trade the government performs a supervisory role,**(15)** particularly where the privity of an agreement between a Papua New Guinean entity and a foreign party excludes the Government.

---

14. Claessen & Peter Skalink, 'The Early State: Theories and Hypotheses', in: The Early State, ed. by Claessen & Peter Skalink. (The Hague: Mouton 1978) 18.

15. P.J. O'Keefe, Arbitration in International Trade, (Sydney 1975) p.9.

In most cases where private commercial agreements are entered into between the foreign party and a Papua New Guinea private entity, there is a considerable degree of freedom of contract (16) allowing the parties to employ the services of a foreign tribunal to resolve any dispute arising from their agreement. On the other hand, if the parties find it in their favour to use the Papua New Guinean tribunals, the protection of the law and the guarantee of impartial justice is afforded by the **Constitution.(17)**

The government's supervisory role amounts to exercising such degree of control over its nationals as to prevent the non-performance of their obligations jeopardizing the goodwill and reputation of the State in international trade. In cases concerning private commercial agreements which feature submission to a foreign court or tribunal, the Papua New Guinea government will not shelter a wrongdoer (18) from liability for an act which is contradictory or inconsistent with the intended purposes of the agreement.

Generally, State authorities responsible for the supervision and control of foreign trade (19) are apprehensive about the consequences of nationals getting into commercial disputes. As an Indian official said: (20)

---

16. The issue of freedom of contract concerning the choice of the parties to subject their agreement to some foreign law and forum is discussed in the latter part of this article.

17. The **Constitution of Papua New Guinea**, section 37(11).

18. See **Investment Dispute Convention Act**, Schedule: article 27.

19. Although in Papua New Guinea NIDA is responsible for the supervision of foreign investment, the Department of Foreign Affairs & Trade provides the diplomatic channel for the acquisition of foreign investment.

20. Report of the Committee on Commercial Arbitration, Directorate of Commercial Publicity, Ministry of Commerce, Government of India: N.D. (June 1965) 17, 20; cited in P.J. O'Keefe, Arbitration in International Trade (Sydney 1975) p.7.

"The number and value of disputes are small in comparison with our export transactions, but as even one bad transaction by a small and indifferent exporter is likely to affected the good name of exports as a whole from this country, the problem of commercial disputes needs proper appreciation".

Much of the supervisory role performed by States in the conduct of international trade, concerning the control over nationals, can only be effective if there is an understanding of reciprocity amongs States. The administration of dispute settlement procedures is made easier if a foreign defendant residing in a foreign jurisdiction can be reached through some reciprocal measures. Papua New Guinea acknowledges such a convenience. (21)

Use of Arbitration: Papua New Guinea Legislation

The submission to arbitration of commercial disputes arising out of international trade and investment has been increasing. Whilst much effort has been concentrated on international arbitration, domestic arbitration has been neglected in Papua New Guinea for the last thirty years. The Papua New Guinea law is the **Arbitration Act.(22)**

The settlement of commercial disputes by arbitration is, restricted to those arising from agreements to which the **Investment Disputes Convention Act** ([23]) does not apply. The **Arbitration Act** therefore may be used for the arbitration of commercial disputes only if:

---

21. The **Judgements Enforcement (Reciprocal Arrangements) Act** 1976 was enacted to cater for the enforcement of decisions obtained abroad against persons residing in Papua New Guinea. This legislation is discussed in the final part of this article on 'Remedies and Enforcement'.

22. Chapter 46 of the Revised Laws of Papua New Guinea. There are however, other Acts, which provide for arbitration which is invoked for disputes arising out of employment concerning particular professions, e.g., The Teaching Services Commission Arbitration Act.

23. Section 8 of the Act States: 'The provisions of the Arbitration Act...shall not apply to proceedings pursuant to the Convention'.

(a) the agreement, being an agreement between the government and a foreign party, does not relate directly to Investment; or

(b) the agreement is between two private entities.

The Arbitration Act is divided into two main parts:

(i) References by consent out of Court; (24)

(ii) References under order of Court.(25)

Papua New Guinea Arbitration Act

Jurisdiction

(a) Reference by consentout of Court

This provision of the Act is available for use by parties who agree to settle their differences by arbitration out of court. It acknowledges a common practice of businessmen who prefer a system less stringent than the the courts but which nevertheless resolves disputes and gives a binding decision.

(b) References under order of Court

The Court has a discretion, when trying a case, to refer to arbitration any aspect of the case it considers appropriate. Section 13 of the Act reads:

> "In a cause or matter (other than a criminal proceeding by the State) -
>
> (a) if all the parties interested, who are not under disability consent; or
>
> (b) if the cause or matter requires a prolonged examination of documents or a scientific or local investigation which cannot, in the opinion of the Court, conveniently be conducted by the court through its ordinary officers; or
>
> (c) if the question in dispute consists wholly or in part of matters of account,

---

24. **Arbitration Act**, section 2-12

25. **Arbitration Act**, sections 13-15

the court may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before an arbitrator agreed by the parties, or before a Referee appointed by the court for the purpose".

Section 13 therefore provides a process of arbitration quite distinct from references by consent out of Court. The most obvious difference is that arbitration under Section 13 is ordered by the court after litigation has been commenced.

Proceedings

Section 2 of the **Arbitration Act** reads:

> "Unless a contrary intention is expressed in the submission, a submission is irrevocable, except by leave of the Court, and has the same effect in all respects as if it had been made an order of the Court".

'The Court' is defined to mean 'the National Court and includes a judge'. The submission is a 'written agreement to submit present or future differences to arbitration...'.**(26)**

(a) Place of Arbitration

The place in which arbitration proceedings is to be held is not specified in the Act, and it is to be noted that the ommission to specify a particular location is a common feature of a greater number of arbitral institutions.**(27)** Nevertheless, the determination of the venue in which the proceedings would take place is of vital importance for the definition of the procedural law.**(28)**

---

26. **Arbitration Act**, Section 1.

27. Benjamin, 'A comparative Study of International Commercial Institutional Arbitration in Europe and in the United States of America', in: **Sanders, International Commercial Arbitration** 351, 381 (1960); cited in A.R. Shalit, 'Procedural Aspects of International Commercial Arbitration', (1973) 2 **Columbia Journal of Transnational Law** 141.

28. Ottoarndt Glossner, 'International Commercial Arbitration: Some Practical Aspects', in: **International Arbitration Liber Amicorum for Martin Domke**, edited by Pieter Sanders. (The Hague: Martinus Nijhoff, 1967) 95, 99.

The choice of the parties as to the tribunal (whether foreign or domestic) is not restricted (29) but the procedural law effective at the place of arbitration will be applicable to the proceedings. Thus, if a foreign tribunal was chosen by the parties to arbitrate on their dispute and insisted that the arbitration be held in Papua New Guinea, then Papua New Guinean procedural law could be applied. However, as is pointed out in the **Investment Disputes Convention Act**,(30) the **Arbitration Act**(31) does not apply to proceedings instituted at the ICSID.(32) This exclusion of the **Arbitration Act** on matters which may require some external or foreign assistance in the resolution of a dispute narrows down the scope of the Act to be restricted to apply to domestic arbitration of disputes.

Of course it would remove any uncertainty and ambiguity if the parties in their arbitration agreement can expressly stipulate in which they prefer the proceedings should take place .

(b) Hearing

'Traditionally, commercial arbitration is surrounded by a certain aura of secrecy'.(33) Some international arbitral institutions emphasize privacy.(34) Does this element of Secrecy apply to arbitration under the Arbitration Act?

---

29. The only control on submissions to foreign tribunals appears to be on Investment disputes. See generally, the **Investment Disputes Convention Act**, section 2.

30. Section 8.

31. Chapter 46 of the Revised Laws of Papua New Guinea.

32. If the 'exhaustion of local remedies' requirement is resorted to, and before any external assistance is used in the possible resolution of a dispute, the Arbitration Act may apply; provided that the dispute remains in substance a domestic issue.

33. Benjamin, **op.cit.** p.139

34. Article 21(4) of the **International Chamber of Commerce Rules of Conciliation and Arbitration 1955** states: 'The hearing shall be private'. Article 29 of the **Arbitration Rules of the U.N. Economic Commission for Europe** states that 'proceedings be held in public'. Section 24 of the American Arbitration Association regulations permits 'all persons having direct interests in the arbitration to attend the hearings and grants to the arbitrator the discretionary power to allow the attendance of other persons'. See footnote 35.

There is no mention in the **Arbitration Act** of the proceedings being conducted in camera and moreover, judging from the amount of control the court exercises over the arbitration proceedings, the implication is that secrecy of the proceedings is regarded as of little significance. On the other hand, there is no reason why the arbitration proceedings cannot be held in private if it is the wish of the parties. 'The circumstances of the parties may be such that any suggestion of a dispute in a particular transaction may ruin the reputation of one party even if it was eventually found that there was no fault'.(35)

(c) Evidence and Proof

Subject to any legal objection, the parties to the reference and all persons claiming through them respectively shall -

(a) submit to be examined by the arbitrators or umpire, on oath, in relation to the matters in dispute; and

(b) produce before the arbitrators or umpire all books, deeds, papers, accounts, writings and documents within their respective possession or power that are required or called for; and

(c) do all other things that during the proceedings on the reference, the arbitrators or umpire may require.(36)

The Act also empowers the arbitrators to subpoena witnesses whose attendance is required before the tribunal.(37) The effect of the above is nothing more than the tribunal being empowered to have access to whatever materials of evidential value a party may have in support of its respective case and it seems unlikely that the tribunal would adhere to the strict rules of procedure and evidence required in litigation. The fact that the procedure before the arbitrators are not normally subject to mandatory procedural rules is seen to be one of the major advantages of arbitration, but the limits within which the freedom from procedural rules may be enjoyed, must be acknowledged.(38).

---

35. P.J. O'Keefe, **Arbitration in International Trade**, (Sydney 1975) 26. O'Keefe also cites an example from Lazarus **et.al., Resolving Business Disputes: the potential of Commercial Arbitration** (1965) No.85, American Management Association Reports 49, 54.

36. Arbitration Act, schedule 1.6

37. **Arbitration Act**, section 16. This practice is quite common of other jurisdictions; see for example: **New York Civil Practice Act**, section 56.

38. Anthony R. Shalit, 'Procedural Aspects of International Commercial Arbitration' (1963) 2 **Columbia Journal of Transnational Law** 143.

Control by Courts

One of the reasons for the vast and rapid development of arbitration in international trade and commerce has been the parties' wish to avoid the technicalities and the atmosphere associated with court proceedings. In certain cases, the nature of the dispute may require experts in the particular trade rather than a judge to decide on the matter.

The commendable efforts to establish arbitration as an independent means of conflict resolution in international trade have not and could not be accorded the same degree of success in the domestic jurisdiction because of obvious disparities in policies and attitudes by National governments towards arbitration and also the conservative stance taken by a surprisingly great number of members of the judiciary. Arbitration is a relatively new means of dispute settlement in Papua New Guinea and perhaps the degree of control the courts exercise over arbitration reflects that uncertainty.

Once submission to arbitration has been made,(39) it seems that the administration of the process of arbitration is closely scrutinized by the courts. The extent to which the application of the **Arbitration Act** (under references by consent out of Court) is mandatory and depends on section 2. The effect of section 2 is such that, while providing for another process of dispute settlement (i.e., arbitration) outside the national courts, it still has the endorsement of the courts and the Judiciary to the extent that the submission has the 'same effect in all respects as if it had been made an order of the court'. This reduces a 'submission' to a stated intention by the parties to opt for arbitration in preference to litigation; such submission being acknowledged by the court. Upon the court being notified of that intention of the parties, the arbitration becomes subject to the supervision of the court.(40)

---

39. **Arbitration Act**, section 2.

40. See for example: section 10; In all cases of reference to arbitration, the Court may from time to time remit the matters referred or any of them, to the reconsideration of the arbitrators or Umpires; section 19: The Chief Justice may, from time to time, make general rules and orders for carrying the purpose of this Act into effect.

Section 13, under which arbitration by 'reference by order of court' may be conducted, is expressly court-controlled arbitration. However, it seems that section 13 serves a significant role in the process of arbitration and the implication here is that the courts may be trying to encourage the use of arbitration as a means of settling disputes 'of a cause or matter which does not warrant criminal proceedings by the State' and consequently those which arise from commercial undertakings. Section 13, it is submitted, acts as a check on those disputants who refuse to use arbitration under section 2 of the Act to settle their dispute in prefering to ligitage. Under section 13 the courts may refer to arbitration, matters they consider best suited for it. However, the court does not disassociate itself from the matter as section 14 reveals:

> (1) In all cases of reference under an order of the court in a cause or matter, the referee or arbitrator shall be deemed to be an officer of the Court, and has such authority, and shall conduct the reference in such manner to the Rules, as the Court directs.
>
> (2) The report of award of a referee or arbitrator on the reference referred to in subsection (1) is, unless set aside by the Court, equivalent to the verdict of the Court.

If a party to the arbitration does not comply with the Award, the Court will enforce the Award in the same manner as one of its own judgments.**(41)** In cases of misconduct by an arbitrator or umpire, the Court may remove him and set the award aside.**(42)** Furthermore, the Court has a discretion to stay proceedings.**(43)** In order to uphold a stay in a particular case, The Court must be satisfied that:

> (a) there is no sufficient reason why the matter should not be referred to arbitration in accordance with the clause to submit to arbitration; and
>
> (b) the applicant for the stay was at the time the writ was issued, and is still, ready and willing to do all things necessary to the proper conduct of arbitration.**(44)**

---

41. **Arbitration Act**, Section 12(1)

42. **Arbitration Act**, Section 11

43. **Arbitration Act**, Section 4

44. **Mauga Loggin Co. Pty. Ltd. v. Okura Trading Co. Ltd.** [1978] PNGLR 259.

There is also a constitutional provision (45) which gives the courts power to review any exercise of judicial authority by tribunals outside the National Judicial System. This means the National Court can be asked by a discontented party to review an award given by a tribunal in the settlement of a dispute.

The nature of the **Arbitration Act**, being primarily designed for application in municipal matters, may afford some explanation for such a considerable degree of control exercised by the courts. The control may be regarded as necessary to safeguard arbitration as a process of conflict resolution against possible abuse because the procedure is not as strict as in a court case. Arbitration also needs an authority like the courts to demarcate the boundaries and the necessary requirements to be satisfied before the process can be used. O'Keefe elaborates:(46)

> The power and functions of the courts...relating to the conduct of arbitration depend on their jurisdiction and the particular national laws dealing with the operations of the technique...they lay down what the State requires by way of control over the technique, e.g., regulation of the matters that may be dealt with by arbitration, the capacity of the disputants to enter into an arbitration agreement, the degree of supervision by the courts etc.

If the rules were not compiled with, any award would be difficult to enforce in that jurisdiction.

The courts not only control municipal arbitration under the Arbitration Act, they also play an important and complementary role in arbitration conducted outside the country. This concerns external arbitration when one of the parties is associated with Papua New Guinea in some way, or when it is a Papua New Guinea entity, or where the subject-matter of the agreement is located in Papua New Guinea and therefore enforcement is sought in Papua New Guinea. The courts enforce foreign awards in Papua New Guinea or endorse an award by stating that it has the effect of a court order.(47)

---

45. The **Constitution** Section 155(3)(a)

46. P.J. O'Keefe, Arbitration in International Trade (Sydney 1975) 45.

47. This aspect of control by courts is discussed fully under the heading 'Remedies and Enforcement', in the latter part of this chapter.

PART III: THE GOVERNING LAW OF ARBITRATION

Papua New Guinea Forum but Foreign Arbitration Procedure?

Can the parties, because of the 'international' aspects of their relationship, by agreement choose arbitration elsewhere than in a Papua New Guinea tribunal when their dispute is before a Papua New Guinean tribunal?

The answer depends on the limitations imposed upon the process of dispute settlement by mandatory prior requirements.

NIDA's Investment Guidelines No.23 provides:**(48)**

> In general, agreements with foreign enterprises should provide for disputes between those enterprises and the Government to be settled by Papua New Guinea tribunals as if all parties to the dispute were Papua New Guineans.

While this provision appears to require 'Papua New Guinea tribunals' to settle such disputes, it does not specify the procedure to be used by such tribunals. In the absence of any provision which denies party autonomy as to procedure in arbitration of commercial disputes, assistance must be sought from the world trend concerning the arbitration of commercial disputes and the autonomy of the parties.

There seems to be international understanding and approval of party autonomy regarding procedure in the resolution of controversies by arbitration. For example, Article 1009 of the **French Code of Civil Procedure** provides:

> The parties must conform to all the rules of the procedure (form & details) which has been established in front of the tribunals, **except if they have already come to another agreement.** (emphasis supplied)**(49)**

---

48. **National Investment Development Authority Act**, schedule 1

49. This is a transaction: See Anthony R. Shalit, 'Procedural Aspects of International Commercial Arbitration', (1963) 2 **Columbia Journal of Transnational Law** 134.

Swiss Law also supports party autonomy concerning procedure:

> "In International private law, the principle of autonomy of the will of the parties is equally respected, in particular that which concerns the competence of the tribunals' arbitration especially the procedure which they are subject to. (emphasis supplied)" (50)

The Arbitral Centre of the Federal Economic Chamber in Austria also allows the parties to supplement a standard arbitral clause (of the Centre) 'by further stipulations as to the substantive or procedural laws to be applied',(51)

The American view is supportive of party autonomy to the extent that even the 'United States **Arbitration Act** itself does not in any wise, attempt to regulate the procedure before the arbitrators or prescribe rules or regulations with respect of hearings before arbitrators.(52)

In spite of all this approval of party autonomy as to procedural law, one question remains; how strong is this autonomy when the government wishes to intervene?

Arbitration in most developed countries has matured into a formidable and autonomous dispute settlement institution. So much so that government intervention in proceedings before an arbitration tribunal is uncommon. The fact that arbitration is a dispute settling process outside the courts should not provide any reason for the government, even if it is an interested party (e.g., host government), to intervene. In Switzerland the Court of Arbitration of the Zurich Chamber of Commerce considers that:

> For governments and state-controlled bodies the same provisions apply as for persons under private law, as these corporate bodies face the Court of Arbitration not as holders of sovereign power, but as persons having rights and duties in the sense of private law.(53)

---

50. Ibid. Also a translation: **Ste. Rhodiciata and Rovyl v. Stes Montecatini and Polymer**, Tribunal de Premier Instance de Geneva, July, 1959, (1959) Revue De l'Arbitrage 91-92.

51. Werner Melis, 'Austria: The Arbitral Centre of the Federal Economic Chamber' in: Handbook of Institutional Arbitration ed. Federic Eiseman. (Oxford 1977) 37.

52. **Foremost Yard Mills, Inc. v. Rose Mills, Inc.,** 25 F.R.D. 9. (E.D. Pa. 1960) cited in Anthony Shalit, op.cit. 135.

53. Bruno Bachman, 'Switzerland: The Court of Arbitration of the Zurich Chamber of Commerce' in: Handbook of Institutional Arbitration in International Trade, op.cit. p.209.

The position in the United States is thus:

> When governments, acting in accordance with the law, enter into agreements to arbitrate commercial disputes, the courts in the United States generally will not uphold challenges to the jurisdiction of the arbitration based on the ground of sovereign immunity. In this connection, however, it should be noted that the authority of the United States Federal government departments and agencies to enter into agreements to arbitrate future disputes does not cover all cases and is limited to situations authorized by specific statutes. In cases in which foreign governments have entered into commercial contracts with American parties providing for arbitration of disputes, United States courts have generally held that such contracts are in the nature of commercial transactions and that foreign governments may not avoid arbitration on the ground of sovereign immunity.**(54)**

The Hamburg Friendly Arbitration in the Federal Republic of Germany holds that:

> Special privileges of immunity for the states and its organs are not extended in arbitration procedures. If Germany authorities have agreed to an arbitration tribunal, they must submit themselves to its jurisdiction. The agreement is subject to the prior consent of the Federal Minister for Finance.**(55)**

Although the these examples are in no way exhaustive of the trend in the world of how tolerant countries are in allowing the principle of party autonomy regarding matters of procedures, it nevertheless reflects on the common and increasing understanding by all types of legal systems to accommodate party autonomy in the arbitration of commercial disputes.

> The only important limitation on the parties and the arbitrators in choosing their own procedural norms is the extent to which decisions that may be rendered will or will not be enforced depending upon the procedure that was followed in the arbitration.**(56)**

---

54. Howard M. Holtzman, 'United States of America: The American Arbitration Association', Id. p.257.

55. Kuno Straathmann, "Federal Republic of Germany: Hamburg Friendly Arbitration', Id., p.51

56. Anthony R. Shalit 'Procedural Aspects of International Commercial Arbitration', (1963) 2 **Columbia Journal of Transnational Law,** 136.

Papua New Guinea having a legal system which is basically a received version of the Common Law, upholds the Common Law principle of Contractual Autonomy, however, with some modifications. Nevertheless, the practice by which parties may subject their contractual agreements to some selected system of law which is agreed, is acknowledged. Here again, the limits within which such intentions may be implemented are spelt out by whatever mandatory law regulating the conduct of commercial agreements may permit and, equally as effective, by the concept of public policy.

If the national tribunals were barred from using foreign procedural rules, it is assumed such a restriction would expressly state so. But the choice of the parties is not a thing that is easily given effect. The problem here is one which has roots in practicality. Although the national tribunals may be allowed to use foreign procedural rules, it may not be quite as easy for the arbitrators to implement rules which are unfamiliar to them, not to mention the difficulties of interpretation of foreign languages. Furthermore, for purposes of convenience and efficiency, it would be better for the parties to exercise their autonomy by choosing their tribunal and leaving the tribunal to deliberate through its own procedure.

From a national control viewpoint, the Government's requirement that investment disputes be settled by Papua New Guinea tribunals is wise. In this respect it may be implied that procedure under the **Arbitration Act(57)** should be used, because the use by a domestic tribunal of procedures other than its own would defeat the whole purpose of the above requirement. To effectively enjoy the autonomy in the choice of arbitration procedure, the parties would be best advised to submit to a foreign tribunal (if it is desirable and appropriate), which is able to use a different procedure.

The question of autonomy depends on how much scope a particular legal system is willing to provide for its exercise because it is one thing to be free to act according to one's intentions and it is yet another to exercise this freedom in the light of the numerous control devices that a government would impose which no doubt would erode the scope of such a freedom.

---

57. Chapter 46 of the Revised Laws of Papua New Guinea

Foreign Tribunal, Foreign Arbitration Procedure

Despite the practical difficulties of a tribunal administering a foreign arbitration procedure, the parties may see advantages in the foreign procedural rules.(58) The Papua New Guinean experience may be divided into two categories: restrictive and unrestrictive.

Agreements to which the government is a party, are required by the Arbitration Act, to be dealt with by Papua New Guinea tribunals using their own procedure. These agreements appear to be subject to control on where to submit the dispute (to the ICSID) upon failure to resolve the dispute by 'exhausting local judicial and administrative remedies'.

Private contracts, may be submitted to a foreign tribunal. Since freedom of contract is recognized in Papua New Guinea, the parties are (within reason), at liberty to exercise their choice. In such a case, the arbitration in a foreign tribunal will be governed by the laws of that tribunal and since the exercise of party autonomy in matters of arbitration procedure is quite common, there is a tendency that party autonomy will be given effect. A point to be noted is that since foreign trade is predominantly government-controlled, the desires of the government to have as much control over commercial transactions with foreign entities may have some influence on where to submit disputes.

Generally there does not seem to be any restriction but the situation is not so liberal as it may seem. A foreign tribunal is presumably equipped with its own procedures and would use those set of procedures if the parties did not expressly exclude them. Submission to a foreign tribunal grants jurisdiction to that tribunal and that jurisdiction alone governs the dispute unless the incorporation of procedures of another system is permitted by that same jurisdiction.

Problems however, arise when the parties have to come into the Papua New Guinean jurisdiction to enforce an award of a foreign tribunal. Enforcement of foreign awards is subject to legislative control in Papua New Guinea.(59)

---

58. For example, the foreign procedure may be less controlled by the court, thus enabling the parties to have some discretion in the manner of techniques used to settle a dispute. The less control by the courts may mean a speedy determination of a dispute and also be binding upon the parties. The Arbitration Act, is noted for its strict control by the courts.

59. See generally the Judgement Enforcement (Reciprocal Arrangements) Act, 1976.

PART IV: THE GOVERNING LAW OF THE AGREEMENT

Whether disputes are to be resolved by arbitration or litigation, in Papua New Guinea or elsewhere, the international aspects of the agreement may often induce the parties to submit the resolution of those disputes and the interpretation of their agreement to a law other than that of Papua New Guinea. The determination of the governing law of an agreement is quite difficult. 'There is no bootstrap magic in a governing law clause'.**(60)** The forum whose conflict rules prevail to determine the proper law in the absence of a specific intention or choice of the parties also must be given due consideration.

It is generally accepted that 'agreements between international persons are...governed by international law'.**(61)** The problem however, lies in the fact that in most cases it is not so easy to view all transnational commercial agreements as international agreements to which international law will apply. Many countries will want to connect the agreement to a legal system which is a lot more predictable than international law and also to a system where the enforcement of decisions on the settlement of disputes can readily be obtained.

The stipulation of foreign law as a governing law in the agreement originates from the principle of lex voluntatis which is deeply rooted in international law. The position in Papua New Guinea is the same as in most Common Law countries concerning a choice of law other than the domestic law; the leading case is **Vita Food Produces Inc. v. Unus Shipping Co. Ltd.(62)** This is a case which involved a contract between a Canadian and an American party for the shipment of goods from Newfoundland to New York.

The contract contained, **inter alia**, a clause which stated that the contract "shall be governed by English Law'. Lord Wright in delivering the opinion of the judicial committee of the Privy Council said:**(63)**

---

60. I. Maw, 'Conflict Avoidance in International Contracts' in International Contracts: Choice of Law and Language (Parker School 1962) 23; op.cit. p.8.

61. Id. p.29

62. [1939] A.C. 277; [1939] 1 All E.R. 513

63. [1939] 1 All E.R. 513, 521

> Connection with English law is not as a matter of principle, essential. The provision in a contract (e.g., of sales) for English arbitration imports English law as the law governing the transaction, and those familiar with international business are aware how frequent such a provision is, even where the parties are not English and the transactions are carried on completely outside England.

Legal development in the choice of the law by parties to contracts has come a long way since that decision. Subsequent decisions have attempted to improve on the general rule enunciated by that decision.(64) In a more recent case,(65) it was held that:

> Where the parties expressly stipulate that the contract shall be governed by a particular law, ...that law will be the proper law of the contract provided that the selection is bona fide and that there is no infringement of public policy...It certainly would be contrary to the public interest if the operation of (a law) as a whole could be circumvented by the simple device of agreeing that some other law will apply to a contract which would otherwise be subject to the restrictions imposed by the Act.

These cases, even though they are distinct from the subject of arbitration as a process of dispute settlement, have a special significance. They illuminate the basic restrictions imposed on the choice of foreign law. These restrictions are imposed by public policy and the relevant mandatory regulations emanating from a domestic jurisdiction where the contract was concluded or is to be performed.

To elaborate on the question of the choice of the parties in Papua New Guinea to choose between legal systems to govern their transaction, it is necessary to distinguish between the two main types of agreements which are dominant in Papua new Guinea concerning international trade; namely investment agreements, and private commercial agreements.

---

64. See also, **Re Claim by Helbert Wagg & Co. Ltd.** [1956] 1 All E.R. 129; per Lord Upjohn, at p.135 'It is provided that the loan agreement is to be construed in accordance with German law. That is very important, for if an agreement is to be construed in accordance with German law it can scarcely be doubted that the parties contemplated that their rights will be governed by German law...'.

65. **Golden Acres Ltd. v. Queensland Estates Pty. Ltd,** [1969] Qd. R. 378, 384, per Hoare J.

Investment Agreement

Investment agreements generally relate to economic development, and more often than not the parties are, the host State on the one hand, and foreign private entities on the other.(66) The practice in Papua New Guinea is that the laws of that country should govern,(67) and this is not uncommon in such agreements (68) concluded by developing countries. In a situation such as this, the mandatory rules (69) which require that the dispute settlement be in accordance with Papua New Guinean procedure, make it impossible to have a choice without contravening those rules.

In the newly developing countries 'a period of transition...from former dependence, whether political or economic...to full independence'(70) has witnessed the expropriation or nationalization of the foreign parties' property or interest in investment ventures entered into with the host State. This has brought an awareness of the possibilities of actions which the host State may take, even in breach of the investment agreement, and the precautions taken by the foreign investors, besides provisions for due compensation, have been to force the host State to accept

---

66. Three examples:
The **Bougainville Copper Agreement** is between the **Papua New Guinea Government** and a consortium of Mining super-powers led by the **Conzinc Riotinto of Australia** 9 C.R.A.) This agreement is contained in the schedule of the **Mining (Bougainville Copper Agreement) (Amendment) Act**, 1974; No.79 of 1974.

An agreement between the **Republic of Ivory Coast** and **Union Carbide** (a U.S. Industrial Corporation) for the erection and operation of an industrial plant in Ivory Coast. See Georges R. Delaume, 'Party Autonomy and Express Stipulations of Applicable Law', 1 Transnational Contracts pp. 13-14.

Revere Jamaica Alumina Ltd. a subsidiary of a U.S. Company and the **Jamaican Government** for the purpose of financing a bauxite mining venture in Jamaica, id. p.44.

67. See discussion under 'The Governing Law of Arbitration', **ante p.62.**

68. Delaume, **op.cit.** pp.38-41

69. See the NIDA Act, schedule 1: Investment Guideline No.23 and also the Investment Disputes Convention Act, section 2.

70. Delaume, **op.cit.** 51

the law of a third country as governing the agreement. The submission to an arbitration presided over by an external tribunal, of disputes arising from investment agreements attempts, **inter alia**, to remove the fears held by investors when dealing with developing countries. Delaume expounds:(71)

> The primary purpose of an arbitration clause in an economic development agreement is to remove possible disputes from the jurisdiction of domestic courts, including not only those of the host state, but also those of the investor's community or some other country, and to afford the parties a neutral forum in which to bring their claims. Under the circumstances, it cannot be said that submission to arbitration should necessary have a determinative impact upon the issue of applicable law.

However, there are agreements in which 'recourse to arbitration co-exists with express stipulations of applicable law in favour of the law...of the host State'.(72) An Indonesian example of an agreement between Pertamina **(Indonesian State Enterprise) and Esso Sumatera Inc.**, and **Mobil Andalas Inc.**, for a production sharing contract, illustrates this point. While arbitration of any submission of disputes is required to be in 'accordance with the **Rules of Arbitration of the International Chamber of Commerce'**,the applicable law is specified:(73)

> LAWS and REGULATIONS
>
> 2.1 The laws of the Republic of Indonesia shall apply to this contract.
>
> 2.2 No terms or provisions of this contract, **including the agreement of the parties to submit to arbitration hereunder, shall prevent or limit the Government of Indonesia from exercising its inalienable rights.** (emphasis supplied) **(74).**

---

71. **Id. p.40**

72. **Id. p.41**

73. **Ibid.**

74. **Ibid.**

A factor common to investment or economic development agreements is that the host State may submit to arbitration, only if it is to an internationally recognized dispute settling authority, when negotiations fail to subject the agreement to the local law for the adjudication of disputes. It seems that for investment agreements in Papua New Guinea, it may not be open to the parties to choose some other law to govern the agreement. This inference is drawn from two facts:

(i) Most disputes arising from investment agreements are required by legislation (NIDA) Act), to be settled by Papua new Guinean tribunals. It is certain that the tribunals will apply Papua New Guinea laws because of the control aspect of that is interwoven into the NIDA legislation.

(ii) Any investment dispute that is not settled by the Papua New Guinea dispute settlement process will be submitted to the ICSID. The Centre being autonomous and having its own independent jurisdiction will determine any dispute according to its rules.**(75)**

The motivation behind this actice is the belief that control may be had of most investment agreements if any dispute arising from such agreements were channeled into the domestic dispute settlement machinery. The alternative arrangement becomes the submission to the ICSID if the investment agreement so provides or local remedies prove insufficient. It is a submission at the expense of national control but it appears that the government is willing to refer a dispute to which it is a party to an international arbitral institution rather than to submit or subject an agreement to the laws of another sovereign State. A logical explanation for this is that the impartiality of an international arbitral institution like the ICSID is less in doubt than that of a foreign domestic institution which may have an interest in the outcome. Another reason would be Papua New Guinea's pride as a sovereign State; its submission to a foreign domestic arbitral institution would imply a dependence on a foreign country's institutions for dispute settlement, which Papua New Guinea would not accept.

---

75. See the **Investment Disputes Act**, Schedule; Article 36(2), but for clarification of applicable law, see Article 42. There is a degree autonomy on applicable law but failing any express stipulation by the parties the centre would apply the law of the contracting state party.

The presumption in these agreements is that there is a greater freedom for party autonomy concerning the choice of a governing law. Of International contracts, Delaume says:

> The stipulation of governing law...vary significantly, depending upon the circumstances and in particular upon whether the parties exercise their choice within a municipal law context or intend to remove the relationship, to a greater or lessor extent, from municipal law.(76)

Indeed, it is upon the parties to agreement, if they desire, to select a governing law of the agreement. The choice however, is subject to governmental controls regulating the conduct of trade and commerce, which may impose restraints on the parties' intentions. Presumably, the parties will want to void conflict of law issues.

The diversity in the conflict rules of many legal systems has directed efforts in the campaign to bypass those rules to a system of conflict avoidance. The efforts have contributed to an alternative (a '**depecage**') where an agreement can be fragmented so that different aspects of it would be governed by its own specific law. The parties would now be able to choose, within the the limits of party autonomy, the law or laws applicable to the contract or certain of its particular features. Delaume elaborates:

> These include matters of performance, such as those concerning modes of performance or the discharge of monetary obligations in accordance with the laws and regulations in effect at the place of payment. Other issues may concern such questions as those regarding formalities, the perfection and validity of security arrangements, such other matters as those relating to capacity, or more precisely, corporate authority to act...When the ultimate choice or series of choices has been made, it is nevertheless clear that the proper law, even though the scope may be narrowed in the process, governs the remainder or residual core of the transaction.(77)

In trying to simplify the governing law phenomenon, the above system, a **depecage**, seems to be a tedious exercise. Moreover, the system is only practicable to the extent that the parties comply with the relevant rules which take precedent over conflict avoidance.(78)

---

76. Delaume, **op.cit.**

77. Id. p. 21-13

78. Ibid. p.13

Apart from being a system of conflict avoidance, the use of the **depecage** in relation to international commercial agreements in Papua New Guinea must be weighed against the government's control policy over foreign investment agreements to evaluate its success in the country. For a country like Papua New Guinea which is eager to fund investment development with foreign capital whilst maintaining the most effective control over foreign investment, there will arise a definite conflict of interests. The prosperity of foreign investment in the country depends a great deal on the reconciliation and compromise between the investors on the one hand and the government on the other. In the case of foreign investors who prefer that a **depecage** apply to the transaction, the government will have to be flexible and work out a mutually agreeable arrangement, even though a **depecage** subjecting the agreement to numerous other laws would remove some degree of control from the government as desired by government policy.

The difficulty that would arise, is in selecting which aspect of the agreement should be governed by some law other than Papua New Guinean, however, it is assumed that as long as the selection is **bona fide** and does not contravene public policy or any Papua New Guinea law, the **depecage** would be implemented.

Papua New Guinea Restrictions on Application of Foreign Laws

The common heritage of the principles of the Common Law and Equity results in similarity in the conflict of laws rules in Australia, England, and Papua New Guinea. In all three countries the governing law (proper law of the contract) is selected according to similar rules of Private International Law (or Conflict of Laws) but subject in each case to public policy of the particular country.

Since the area of conflict of laws in Papua New Guinea has not been developed as much as other areas of municipal law, the courts will look to the English precedents in case law to determine cases at hand, insofar as English law is applicable to Papua New Guinea. In this respect it is wise to point out areas where the local forum will not admit foreign laws.

(a) Penal Laws

There is a rule founded on:

> a well-recognised principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State government, or of someone representing the public, are local in this sense, that they are only cognisable and punishable in the country where they were committed. Accordingly no proceedings, even in the shape of a civil suit, which has for its

> object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the lex fori ought to be admitted in the courts of any country.(79)

Nevertheless, this area of law concerning 'penal law' is not well defined and has been confusing.

> In its ordinary acceptation, the word 'penal' may embrace penalties for infractions of general law which do not constitute offences against the State: it may for many legal purposes be applied with perfect propriety to penalties created by contract; and it therefore, when taken by itself, fails to mark that distinction between civil rights and criminal wrongs which is the very essence of the international rule...(80)

The 'penal law' exlcusionary doctrine would therefore not apply to International contracts which involve a penalty clause because of the basis ofthe action; even though such a clause would appear a to be 'penal law' in its broad construction, the action is founded on Contract and possesses no criminal complexion. Lord Watson further elaborates:

> All the provisions of municipal statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provisions are, in a certain sense, offenders against the State law as well as against individuals who may be injured by their misconduct. But foreign tribunals do not regard these violations of statute law as offences against the State, unless their vindication rests on the State itself, or with the community which it represents. Remedies may be attached to them, but those circumstances will not bring them within the rule, except in cases where these penalties are recoverable at the instance of the State, or an official...on its behalf...(81)

In contracts where the Papua New Guinea community as a whole, represented by the government, is a party, the problem associated with the exclusionary doctrine may be overcome by a reciprocal arrangement between States engaged in such commercial agreements to recognise the foundation upon which the claim is based (i.e. Contrac Law) and enforce the rights accordingly.

---

79. **Huntington v. Attril.**, [1893], A.C. 150 per Lord Watson; cited in: J.L.R. Davis, Casebook on Conflict of Laws in Australia (Australia Butterworths 1971) 150.

80. Ibid.

81. Ibid.

(b) Confiscatory Legislation

Confiscatory legislation in this context means legislation enacted by a foreign Sovereign to exercise some right of a confiscatory nature over property which is situated outside the foreign Sovereign's jurisdiction. Such legislation is, as is repeatedly pointed out in the cases, in direct conflict with the general rule that 'the lex situs ...governs the transfer of moveables effected contractually'.(82) English Courts hold the position that they 'will not recognise the validity of foreign legislation aimed at confiscating the property of particular individuals or classes of individuals...(83) If such a case was referred to the Papua New Guinea courts, it is most likely that English precedents would be used as substantive authority to follow suit.

(c) Revenue Laws

> It is perfectly elementary that foreign governments cannot come - nor will the courts of other countries allow our government to go there - and sue a person found in that jurisdiction for taxes levied and which he is declared to be liable to in the country to which he belongs.(84)

Although this area of law relates to proceedings instituted by foreign Sovereigns in courts outside their own jurisdiction, it also includes proceedings by private persons and organizations. Since the revenue laws of a country may confer on a private person a right against a defendant in a foreign court, such an action may also be barred on the ground that it involves the enforcement of the Revenue laws of a foreign sovereign. It seems therefore that the factor which a court seeks is whether the State, in the last resort, will benefit in any significant way from the action instituted by a foreign plaintiff, claiming money. If they find that factor, the courts will refuse to entertain the action. In Papua New Guinea there is legislation dealing specifically with this matter. Section 2(2)(b) of the **Judgments Enforcement (Reciprocal Arrangements) Act**, states:

---

82. **Bank voor Handel N.V. v. Slatford,** [1953] 1 Q.B. 248, 257, per Devlin, J.

83. Re **Claim by Helbert Wagg & Co. Ltd.**, [1956] 1 All E.R. 129, 139 per Upjohn, J.

84. **King of the Hellenes v. Boston** (1923) 14 Ll.L.Rep. 190, 193; cited by Viscount Simonds in: **Government of India v.** Taylor[1955] A.C. 491; [1955] 1 All E.R. 292, 295, (H.L.). However it should be noted that by virtue of statutory amendments in various Australian States, Papua New Guinea income tax is now generally recoverable in Australia.

> Any judgement of a superior court of a foreign country to which this Part (Registration of Foreign Judgements) extends, other than a judgement of such a court given on appeal from a court which is not a superior court, shall be a judgement to which this part applies if -
>
> (a) ...
>
> (b) there is payable under it a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty....

(d) Public Policy

The concept of public policy inevitably lies across the path of complete autonomy in the choice of law to govern international commercial agreements. 'Definitions of public policy are notoriously slippery. In a sense any action taken by an governmental agency is public policy'.**(85)** In the present context, public policy is a representative consensus of interest towards having a system against which the decisions of foreign dispute settlement institutions may be assessed. The courts in Papua New Guinea are an integral part of the system of government and are responsible for giving effect to what is considered to be in the best national interest. In doing so, the courts are able to exclude the enforcement of decisions rendered by a foreign tribunal which for accepted reasons may be against public policy. Thus, public policy plays an important part in the setting of standards concerning choice of law in agreements which by reasons of that choice render disputes arising within Papua New Guinea to be settled by some extraneous laws.

It seems to be a common fact that:

> Every country will inevitably draw down curtains against the enforcement of rights arising elsewhere where something repugnant to its basic national concepts is involved. Such repugnancy may be constituted by conflict with its basic legal notions. It is therefore impossible to lay down any precise rules.**(86)**

Generally, there is similarity in the limitations imposed on the exercise of choice concerning governing law in international agreements with that which prevails in England and in Australia, owing to the Common law heritage.

---

85. Jau A. Sigler and Benjamin R. Beede, The Legal Source of Public Policy (1977) 3.

86. E.I. Sykes and M.C. Pryles, Australian Private International Law (1979) 152.

Illegal contracts will not be enforced no matter what the governing law (is). However, the matter of 'illegality' is of a rather technical nature'.(87) Each of the two countries including Papua New Guinea would have their own interpretation of what constitutes illegality. 'Some contracts which are against the policy of the law are clearly 'illegal' within the sense of the maxim **ex turpi causa non oritur actio**, as in the case of a contract to bribe a public official.(88) On the whole, the courts in Papua New Guinea would not enforce any rights under an agreement which is subject to a foreign law with the intention of evading local laws because they require disputes to be submitted to local tribunals (89) for reasons of national control.(90)

Public policy is also very much politically influenced and agreements entered into privately between Papua New Guinea entities and a foreign party of a country with which any association is prohibited by the Government of Papua New Guinea, would be held to be of no effect on the grounds of illegality. For example, trade with South Africa is forbidden because of the trade embargo imposed by the Papua New Guinean Government in protest against the practice of apartheid in South Africa.

PART V: REMEDIES: ENFORCEMENT IN PAPUA NEW GUINEA

The ultimate purpose in pursuing a claim in any process of commercial dispute settlement is achieved when the judgement or award is compiled with by the party against whom it is given and the person in whose favour the judgement is given enjoys whatever benefit accrues from it. Unfortunately, dispute settlement does not necessarily come to an end when a judgement or award is rendered; disputes may still arise as to the effect and implementation of the judgement or award.

The character of commercial agreements between Papua New Guinean entities and foreigners can still raise problems concerning enforcement of the judgement or award because of the transnational nature of the proceedings. The impact of the problem of enforcement of decisions from transnational dispute settlement tribunals is much more felt in the area of international commercial arbitration. O'Keefe touches on this problem:

> A major difficulty with the arbitral process is the fact that a losing party in an arbitration may be greatly tempted to refuse to carry out the award; this being in spite of the

---

87. Id. p.152

88. Ibid.

89. **National Investment and Development Authority Act**, Schedule 1: Investment Guidelines No.23

90. **Golden Acres Ltd v. Qld. Estates Pty Ltd** [1969] Qd.R 378.

> fact that his undertaking to enter into the process carries with it consent to be bound by the decisions of the arbitration and in spite of the fact that the award is validly made.(91)

The legal position in Papua New Guinea concerning the recognition and the enforcement of judgements and awards rendered by a foreign forum is derived from the Common Law. Understandably, the 'basic condition of recognition and enforcement is that the foreign judgement must have been rendered by a court having jurisdiction in the international sense, ...i.e., according to the conflict rules of the recognizing forum'.(92) It is also well established that:

> At common law, a foreign court is deemed to have jurisdiction in the international sense if: (i) the defendant was present in the country of the rendering forum at the commencement of the proceedings; or (ii) the defendant submitted to the jurisdiction of the rendering forum.(93)

The Courts and Enforcement

Beyond the municipal courts, any decisions rendered by other institutional dispute settlement authorities lack the compelling impetus which a court order or judgement generates. This effect of court decisions is derived from the control that the government administers, which assumes the power to police and punish non-compliance to any orders made by the courts against persons within the territorial jurisdiction of that State. The problems obviously arise when a court of one country gives a judgement which for all practical purposes is against a defendant in another country. Such a situation calls for co-operation in what may now be termed as 'transnational litigations', and nothing less than the use of courts will remedy the situation.(94)

Basically, in the enforcement of remedies rendered in the course of a settlement of commercial disputes, the courts may be faced with two types of decision; Foreign words, and Foreign Judgments.

---

91. O'Keefe, **op.cit.**

92. G.R. Delaume, 'Recognition and Enforcement of Foreign Judgement in England and the United States' 1 Transnational Contracts (Columbia University, 1980) 4.

93. Ibid. p.5 - Further discussed under 'Foreign judgements', **supra.**

94. Acknowledgement is given to the private sanctions imposed against non-compliance to arbitral awards by groups engaged in common-commodity trade or trading partners with some common interest in the conduct of commercial transactions. O 'Keefe, **op.cit.** 209.

Foreign Awards

Unless the minicipal courts of the rendering tribunal endorse a foreign awards (giving it the effect of a judgment of those courts) enforcement of foreign awards (in the absence of treaty arrangements) in Papua New Guinea may be difficult to obtain. This is because the **Judgements Enforcement (Reciprocal Arrangements) Act** caters only for foreign judgements.

Foreign Judgements

The medium through which foreign judgements may be enforced in Papua New Guinea is provided for by the **Judgements Enforced (Reciprocal Arrangements) Act.(95)**

The purpose of this Act is, **inter alia**, to:

(a) ...make provisions for the enforcement in Papua New Guinea of judgements given in foreign countries which accord reciprocal treatment to judgements given in Papua New Guinea; and

(b) for facilitating the enforcement in foreign countries of judgements given in Papua New Guinea...**(96)**

The power to give recognition to the enforcement of a foreign judgement sought in Papua New Guinea lies in the satisfaction of the Minister for Justice that 'substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgements given in the (Papua New Guinea) National court...'**(97)** One of the major features of the **Act** is that it is very much dependent upon reciprocity and where there is no reciprocity the Minister is empowered to make foreign judgements unenforceable.**(98)** The provision requiring reciprocity seems to concern mainly foreign countries with totally different legal systems to that of Papua New Guinea which is substantially of

---

95. No.74 of 1976

96. The long title of the **Judgements Enforcement (Reciprocal Arrangements) Act.**

97. **Judgements Enforcement (Reciprocal Arrangements) Act,** section 2.

98. **Judgements Enforcement (Reciprocal Arrangements) Act,** section 2.

common law origin. Moreover, it is likely that the Papua New Guinea courts would refuse enforcement of judgements of common law countries where the judgment is a decision in which all the necessary requirements have been satisfied.

Application to register foreign judgements is made to the National Court by the person seeking enforcement ('Judgement creditor') at any time within six years from the date when the judgement is obtained.(99)

Section 5(1) states that registration may be refused if the registering court is satisfied:

(i) ...

(ii) that the courts of the country of the original court had no jurisdiction in the circumstances of the case; or

(iii) that the judgement debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear; or

(iv) that the judgement was obtained by fraud; or

(v) that the enforcement of the judgement would be contrary to public policy in the country of the registering court; or

(vi) that the rights under the judgement are not vested in the person by whom the application for registration was made....

Other than these grounds for setting aside the enforcement of foreign judgements in Papua New Guinea, the courts have no power under the Act to rectify a foreign judgement if a similar case in Papua New Guinea would have been decided favourably for the plaintiff than in the foreign country. The court must enforce a foreign judgement according to its terms; as a decision of the foreign court or tribunal with the necessary local registration requirements.

Any enforcement of court decisions or awards against the government is a real test of how independent and effective the Judiciary is in Papua New Guinea. If the judiciary is as inde-

---

99. Judgments Enforcement (Reciprocal Arrangements) Act, section 2.

pendent as suggested in the earlier part of this chapter, the court would be impartial and would decide a case on the evidence according to law.

The enforcement of foreign awards against Papua New Guinean parties is not so easily determined as a case originally submitted to Papua New Guinean courts or tribunals. While most commercial cases are decided in the light of social and economic policies safeguarding Papua new Guinean national interests, and therefore enforceable in the country, decisions on disputes resolved abroad will come under intensive scrutiny before enforcement can be granted. On the whole, private individuals and corporations are easily reached for reasons of enforcement of foreign awards, if prior legislative requirements are complied with. This flows from the fact that the Papua New Guinea government's supervisory role in international trade and its control over the foreign investment would have so much influence over the behaviour and conduct or participants that the government can direct participants to comply with foreign awards if the necessary requirements for enforcement in Papua New Guinea are fulfilled.

The question of enforcement of foreign awards against the Government must be considered in the context that the Government will seldom submit to external forums apart from the ICSID.(100) Even the submission to the ICSID requires the prior exhaustion of local remedies. A dispute could be submitted directly to the Centre without any reference to local remedies, by agreement. So assuming that an enforcement of an award against the Government given by the Centre is sought by a foreign party, what are the chances of enforcement?

Two factors appear to be most persuasive and influential. First, not to comply with any award rendered by an impartial tribunal agreed to by the parties (especially an external tribunal), will be detrimental to the overall reputation of the Government in international trade, especially among potential investors. The necessity and importance of foreign investment in the development programmes of the Government would be a restraint on the government to refrain from any action which would jeopardise its relations with the foreign investment institutions. Secondly, the enforcement of an award rendered by the ICSID has the effect of a court judgement:

---

100. The trade agreements between the United Kingdom and Papua New Guinea and between the Federal Republic of Germany and Papua New Guinea refer to ICSID for the settlement of disputes by arbitration if the matter is not settled by the deliberations of both governments concerned. (copies held by the author).

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by the award within its territories as if were a final judgement of a court in that State...

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority such State shall have designed for this purpose a copy of the award certified by the SecretaryGeneral...

(3) Execution of the award shall be governed by the laws concerning the execution of judgements in force in the State in whose territories such execution is sought.(101)

Thus, then, enforcement against the Government is practically possible if the agreement from which the dispute arises requires submission to the ICSID, and if the Government initially submits. Any decisions rendered elsewhere is otherwise difficult to enforce because of the fact that the Government would be less inclined to be subject to the external tribunals's jurisdiction as discussed in the earlier part to this chapter.

It is also worth noting that according to a municipal law,(102) 'when a judgement is given against the state, the registrar, clerk or other proper officer of the court by which the judgement is given shall issue to the party in whose favour the judgement is given, a certificate...'(103) stating the particulars of the judgement and providing proof to that effect. Section of the Act provides:

> 'On receipt of the certificate of a judgement against the State, the Secretary for Finance shall satisfy the judgement out of moneys legally available.'

---

101. **Investment Disputes Convention Act**, Section 1; schedule: article 53. The laws primarily governing the execution of judgements and subsequent enforcement are contained in the **Judgements Enforcement (Reciprocal Arrangements Act.** For Grounds upon which enforcement may generally be refused, see section 5(1).

102. **Claims By and Against the State Act**, Chapter 30 of Revised Laws of Papua New Guinea.

103. **Claims By and Against the State Act**, section 6(2).

The court referred to in the Claims By and Against the State Act, are the domestic Courts and it is difficult to see the act being applied in cases where a foreign tribunal has initially deliberated. However, the very existence of this act must provide some confidence to the foreign litigant in Papua New Guinea that if they can prove their case to the satisfaction of the court, they can enforce the judgement even against the government.

PART VI: CONCLUSION

The restrictions imposed upon party autonomy by the state preference that investment disputes be submitted to domestic tribunals are not of a binding nature. The submission to these tribunals is not because there is a better Papua New Guinean law applicable to the dispute. There is no specific Papua New Guinea law on the resolution of international investment disputes. The restriction is viewed mainly as a system by which some control over the dispute-settlement aspect of investment agreements may be attained by the government. The preference urges the parties to an investment dispute to submit to a domestic tribunal at the first instance. Upon proving the domestic tribunal incapable or inappropriate, the parties may submit to an external tribunal.

The ultimate and residual control Papua New Guinea has over party autonomy and consequently foreign awards or foreign law, arises if the award or judgement needs to be recognised and enforced in Papua New Guinea; at that point domestic courts in Papua New Guinea can interfere. Therefore in selecting a foreign forum or foreign law, one must have regard to recognition and enforcement in Papua New Guinea. In many cases it amounts to a check as to whether the foreign decision is one which the courts or tribunals in Papua New Guinea, given the opportunity, would have rendered. This not only involves considerations of what the law would have permitted in the circumstances of a particular case, but also involves considerations of morality and more importantly, the need to safeguard the national interest against anything which may contribute to the undermining of Papua New Guinean political, economic and legal institutions.